Oct. 10. 78. Argd & W. Strayer

Vol. 1 381

Oct 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~353.~~ 90

RUSH BURGESS, COLLECTOR OF INTERNAL REVENUE,
PLAINTIFF IN ERROR,

vs.

WILLIAM L. SALMON AND W. T. HANCOCK, AS SALMON & HANCOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED FEBRUARY 8, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 353.

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vs.

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1 In the circuit court of the United States for the eastern district of Virginia, at Richmond in said district, on Wednesday the 17th day of November, 1875.

Present, Hon. Ro. W. Hughes, judge.

WILLIAM L. SALMON AND W. T. HANCOCK, partners, trading under the name and style of Salmon & Hancock, plaintiffs,
against
RUSH BURGESS, DEFENDANT.

No. 1226. Common law.

Action.

A plea of trespass on the case in assumpsit.

Be it remembered that heretofore, to wit, on the 13th day of July 1875, came the defendant and filed before the judge of said court a petition for a writ of certiorari, which is in the following words and figures, to wit:

Petition for certiorari.

To hon'ble judge of circuit court of U. S.:

Petition for writ of certiorari.

Your petitioner, Rush Burgess, respectfully represents to this hon'able court that he was the collector of int. rev. for the United States
2 for the 3rd dist. of Virginia, appointed under the provision of an act entitled "Act to provide internal rev. to support the government, to pay interest on the public debt, and for other purposes," passed June 30, 1864.

That a suit has been instituted by W'm L. Salmon & W. T. Hancock, partners, trading under the name & style of Salmon & Hancock, against your petitioner, Rush Burgess, as said collector of int. rev. for the 3 dist. of State of Virginia, def't in circuit court of city of Richmond, State of Va., in an action of trespass on the case in assumpsit to recover the sum of $500, which said suit is now pending and undetermined, and the summons therein has been personally served upon your petitioner requiring him to appear & plead to said action on the first Monday of June, 1875.

That the only pretended cause of action included in said suit is a claim vs. your petitioner as such collector fo' moneys collected by him from said Salmon & Hancock, on account of an assessment of the Int. Rev. Department of 4c. additional tax under the ruling of the
3 Com'r of Int. Rev. at Washington on the act of March 3, 1875; which said money was received by your petitioner as such collector for the United States, and by him paid into the treasury of U. S. as required by law, and does not involve in any manner whatever any matter against your petitioner personally but only against him for acts by him performed in the line of his duty as such collector.

And your petitioner therefore prays that the said action so commenced and now pending in the circuit court of city of Richmond may be removed from the said court to this the circuit court of United States for eastern district of Virginia, this being the judicial district in

which the said circuit court of city of Richmond is held; and that the writ of certiorari may be issued out of this court directed to said circuit of city of Richmond to send to this court all the records & proceedings in said cause according to the provisions of the statute of United States in such case made & provided.

RUSH BURGESS.

EASTERN DISTRICT OF VIRGINIA:

4 Rush Burgess being duly sworn, says *says* that he had read the foregoing petition before being sworn, subscribed, & knows the contents thereof & the same is true of his own knowledge.

RUSH BURGESS.

Subscribed & sworn to before me this 13th day of July, 1875.

M. F. PLEASANTS,
U. S. Com'r E. Dist. Va.

I do hereby certify that I am att'y & counsellor at law practicing in the courts of United States and in the courts of State of Virginia, and that I am counsel for Rush Burgess, the above-named petitioner in the suit mentioned in said petition, and that I have carefully enquired into the matter set forth in the said petition & believe same to be true.

L. L. LEWIS,
Att'y for Burgess.

Order for cert'orari.

Thereupon it was ordered by the court as follows:

5 This day came the parties by their attorneys and the petition of the defendant being filed, praying that this cause be removed from the circuit court of the city of Richmond into this court for trial, it is ordered that a writ of certiorari issue in accordance with the provisions of the act of Congress in such case made and provided; and by consent of parties by their attorneys it is ordered that this cause be set down for trial on the first Monday in September, 1875.

Writ of certiorari.

The following writ of certiorari was issued pursuant to the foregoing order and returned executed:

The President of the United States of America to the judge of the circuit court of the city of Richmond, of Virginia, greeting:

We for certain reasons being desirous that our circuit court of the United States for the eastern district of Virginia, in the fourth circuit, shall be certified of a certain cause commenced before you against Rush Burgess, defendant, by Salmon & Hancock, plaintiffs, do, therefore, command you that the record and proceedings in the said cause

6 you distinctly and openly send to the said circuit court at the city of Richmond forthwith as fully and amply as the same are remaining before you by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness M. R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the thirteenth day of July, in the year one thousand eight hundred and seven'y-five.

M. F. PLEASANTS, *Clerk.*

Certificate of service.

Delivered a copy of this writ to Alfred Shields, cl'k of the circuit court of Richmond, July 14, 1875.

CHARLES P. RAMSDELL,
U. S. Marshal.

In obedience to the writ of certiorari the following record and proceedings of the circuit court of the city of Richmond were filed on the day of , 1875.

RECORD OF THE CIRCUIT COURT OF THE CITY OF RICHMOND.

Declaration.

STATE OF VA., CITY OF RICHMOND:

7 In circuit court of city of Richmond.

William L. Salmon and W. T. Hancock, partners, trading under the name & style of Salmon & Hancock, pl't's, complain of Rush Burgess, def't, who has been summoned to answer them of a plea of trespass on the case in assumpsit; for this whereas on the 2nd day of March, 1875, at the city of Richmond & State of Virginia, they were the owners & manuf'u's of nine thousand four hundred & forty-five lbs. (9,445 lbs.) , manufactu'ers before the 3d March, 1875, which said tobacco was stamped with revenue-stamps of 20c. denomination, and purchased under instruction issued before that time by the Com'r of Int. Rev., at Washington, to all collectors of the rev. of the U. S., and especially to the def't, as such collector, to continue to sell stamps of said denominations of 20c. under the old law until otherwise directed, and the said pl't's allege that the said def't did continue to sell the said stamps until ordered to discontinue the sale of same by said Com'r, at Washington, which were given at 5 o'clock p. m. of the evening of 3rd March, 1875, and not until said stamps had been placed on the boxes contain-
8 ing said manf. tobacco, and not until they had been cancelled, and not until the said tobacco then stamped & cancelled had been shipped from the pl't's factory; all of which was done before the President of U. S. approved & signed an act known as "An act to protect the sinking fund and provide for the exigencies of the gov.," which act was signed at 9 o'clock p. m. of the 3rd March, 1875.

That the said Burgess, as collector of the 3rd rev. district of Va., well knowing these facts, but wrongfully and illegally demanded the said assessment of 4c. per lb. additional on this tobacco over & above what the said tobacco was liable under the then existing law of the 6th June, 1872, to wit, the sum of three hundred & seven'-seven dollars and eighty cents (377.80), and did then & there illegally & wrongfully threaten the said pl't's that he would seize the said manf. tobacco unless the additional sum of $377.80 which had before that time been illegally & wrongfully assessed on the said *said* manf. tobacco was paid to him, the said Rush Burgess.

Whereupon the said plaintiffs, solemnly objecting and protest-
9 ing against the said illegal and unlawful assessment and collection of 4c. per lb. additional tax on said man'f' tobacco, did then & there, to wit, on 29 April, 1875, pay the said sum of $377.80 to the said def't as collector aforesaid, within the collect'on dis-

trict aforesaid, and within the city and State aforesaid, and the said def't afterwards, although requested by said pl't's, refuse then & there to restore the said sum to them. Whereupon the said pl't's appealed to the Com'r of Int. Rev. at Washington against such illegal & unlawful assessment and collection of the said $377.80 by the said def't, which said appeal was afterwards, to wit, on the 13 day of May, 1875, decided by said Com'r adversely to said plaintiffs, whereof the said defendant afterwards, to wit, had notice, to wit, at city and State aforessid, whereby and by reason of the premises he, the said Rush Burgess, def't as aforesaid, became liable to pay the said pl't's the sum of $501, and being so liable, the said def't, in consideration thereof, then & there undertook & promised to pay the said sum of $501 whenever the said def't should be thereafterwards requested, but to pay the same or any part
10 thereof hath hitherto refused, and still doth refuse, although said def't hath been often requested by said pl't's to do so, at the city & State aforesaid.

And for this: whereas on 2d day of March, 1875, at the city and State aforesaid, the said plaintiffs, as manufacturers of tobacco at the city and State aforesaid, had manufactured a large quantity of tobacco, to wit, 9,445 lbs., which said tobacco they had on hand on the 3d of March, 1875, the day on which the President of the United States approved of an act of Congress entitled An act to further protect the sinking fund & provide for the exigencies of the government, which approval and signature was at 9 o'clock p. m. of the said 3d March, 1875; and for this further, to wit, the said plaintiffs did, on the said 3d of March, at the city and State aforesaid, and within the 3rd collection district of the said State, purchase from the said defendant (or his deputies) as collector of the internal rev. for said district, internal rev. stamps to the amount of $1,889, under the then existing law of 6 June, 1872, before the President had signed & approved the said amended act to
11 protect the sinking fund, which was done at 9 o'clock p. m. of said 3d March, and the said plaintiffs did then and there place the said rev. stamps on the said 9,445 lbs. of man'f' tobacco before that time manufactured, & before the said signature & approval of the President had been affixed to said act, and they did cancel the said stamps, and they did ship said tobacco from their factory then stamped & cancelled before the President's approval & signature was affixed to said act.

And for this further, to wit, that afterwards, on day of , at city & State aforesaid, the said defendant, well knowing these facts, illegally & wrongfully assessed & collected of the said plaintiff four (4c.) cents per lb. additional int' rev' on the said 9,445 lbs. of man'f' tobacco, to wit, the sum of $377\frac{80}{100}$, pretending to do so under an act of Congress which had not become a law at the time of the purchase of said internal rev' stamps of $1,889, nor at the time of affixing & cancelling same on the said 9,445 lbs. of man'f' tobacco. And the said defendant then & there did wrongfully & illegally threaten the said
12 plaintiff that unless they paid to him, the said defendant, the said illegal assessment before that time made, of 4c. per lb. on the said man'f' tobacco of 9,445 lbs., amounting to a great sum, the sum, to wit, of $377.80, that *that* he would seize the said manufactured tobacco.

Whereupon the said plaintiff, at the city and State aforesaid, and within the said collection district, solemnly objecting and protesting against the illegal & unlawful assessment & collection of said sum of $377.80, did then & there pay, to wit, the 29 April, 1875, the said sum

to the said defendant as collector as aforesaid, and although the said defendant was often requested at city & State aforesaid to refund the said sum thus illegally & unlawfully collected, he continued to refuse, whereupon the said pl't's afterwards, to wit, on 23 *the* day April, 1875, appealed to the Com'r of Internal Rev' at Washington against such illegal & unlawful assessment, and against such illegal & unlawful collecting the said sum of 377.80 by the said def't in the city and State
13 aforesaid, which appeal was afterwards, to wit, on 13 day of May, 1875, decided adversely to the said plaintiffs, all of which the said def't afterwards, to wit, on day & year aforesaid, had notice, by reason whereof an action has accrued to the said pl't's the said def't under an act of Congress made & provided for such cases.

Whereby and by reason of the premises, he, the said Rush Burgess as defendant aforesaid, became liable, and being so liable, the said def't, in consideration thereof, then & there undertook & faithfully promised the said pl't's to pay to them the said sum of $501 whenever the said def't should be thereafter requested, but to pay the same or any part thereof hath hitherto refused, & still doth refuse, although often requested, to the damage of the said pl't of $501, at the city & State aforesaid.

And for this further, to wit, that the said pl't's, at the city and State aforesaid, on or before the said 3d day of March, 1875, purchased of the said def't, as collector of 3d int. rev. district of V'a, $1,889 worth of int. rev. stamps, on or before the 3d March, 1875, and they, the said pl't's, affixed the said rev. stamps on or before the said 3d March,
14 to their man'f. tobacco before that time manufactured, and cancelled the same according to existing law, & to the rule & regulation of the Int. Rev. Department; all of which was done before the President of U. S. approved & signed a certain act of Congress known as an Act to further protect the sinking-fund & provide for the exigencies of the gov., which approval & signature was done in the city of Washington, on the 3d March, at 9 p. m. of that day, and the said def't, well knowing these facts, did afterwards illegally & wrongfully, to wit, on day of collect an additional int. tax of 4 c. per lb. on the man'f. tobacco of the said pl't's, to wit, the sum of $377.80, and threaten illegally & wrongfully, in the event the said sum then & there was not paid him by the said pl'ts, that he would seize the said tobacco belonging to them. Whereupon the said pl't's, solemnly objecting & protesting against the said illegal collection of $377.80 from them, to wit, 29 April, 1875, paid the same to the said def't as aforesaid, and appealed to the Com'r of Int. Rev. at Washington, under the statute made & provided in such cases, which appeal was afterwards, to
15 wit, on 13 day of May, 1875, decided adversely to said pl't's, whereby an action accrued to them, by reason whereof the said Rush Burgess, as def't, became liable to them in the sum of $501, and being so liable, the said def't, in consideration, then & there undertook and faithfully promised the said pl't's to pay to them the sum of $501 whenever the def't should be thereafterwards requested; although often requested, hath hitherto refuse' & still doth refuse, at the city and State aforesaid.

And for this, to wit, that heretofore, to wit, on the day & year aforesaid, at the city & State aforesaid, the said pl't's were the owners of a large quantity of manf. tobacco, to wit, 9,445 lbs., manufactured by said pl't's before the said 3d March, 1875, and being such owners & manufacturers, they purchased of said def't, or his deputies, int. rev. stamps, on or before said 3d March, 1875, under the then existing law,

of great value, to wit, revenue stamps at 20 c. per lb. on said 9,445 lbs. of manf. tobacco, am't to $1,889; and for this, to wit, that the said pl't's, as such owners and manufacturers, did, on the said 3rd March, place on said manf. tobacco the said rev. stamps, and cancelled
16 same on said day; all of which they allege was done under the then existing law of June 6th, 1872, and before the approval & signature of the President of U. S., of a certain act of Congress, entitled "An act to farther protect the sinking-fund and provide for the exigencies of the gov." And whereas the said def't, well knowing these facts, did afterwards, on day of , and place aforesaid, assess the said manf. tobacco belonging to the said pl't's with an additional int. rev. tax of 4 c. per lb. to wit, with $377.80, and the said def't, at place aforesaid, and on day of , did threaten the said pl't's unless they place the said additional assessment of 4 c. per lb. on the said manf. tobacco, to wit, the sum of $377.80, that he, the said def't, would seize the said manf. tobacco then & there in possession of said pl't's. Whereupon the said pl't's, solemnly objecting and protesting against the said illegal assessment and collection aforesaid of the said $377.80, paid the same, to wit, 29 April, 1875, to the said def't, and afterwards, to wit, appealed to the Com'r of Int. Rev. at Washington, under the statute & regulation of the dep't made & provided for such cases;
17 which appeal was afterwards, to wit, 13 day of May, 1875, *was* decided adversely to said pl't's. Whereupon a certain action accrued to them against the said def't, whereto the said def't became liable & then & there undertook & promised to pay to them the sum of $501, but to pay the same, or any part thereof, although often requested, hath refused, & still doth refuse, at the city & State aforesaid.

And whereas, also, the said defendant was afterwards, to wit, on day & year aforesaid, and in the city and State aforesaid, indebted to the said plaintiffs in another sum of $501 for so much money by the said pl't's to the use of *of* the said defendant, at his special instance and request, before that time laid out & expended, and for so much money to the said defendant, at his special instance & request, before that time lent & advanced by the said pl't's; and also for so much money by the said defendant to the use of the said pl't's, before that time had & received; and, being so indebted therein, the said def't, in consideration thereafter, afterwards, to wit, on same day & year last aforesaid, and at the city & State aforesaid, assumed upon himself and then &
18 there promised the said pl't's that he, the said def't, would well & faithfully pay the said sum of $501, when requested; and whereas the said def't afterwards, to wit, on same day & year, and place aforesaid, accounted with the said pl't's of and concerning divers sums of lawful money from the said def't to the said pl't's before that time due & owing, and then & there in arrears & unpaid, & upon that account the said def't was then & there found in arrears, and unpaid to the said pl't's in the further sum of $501, and being so in arrears & indebted, the said def't, in consideration thereof, to wit, on the day, year, & place last aforementioned, then & there promised to the said pl't's well & truly to pay the said sum of $501 whenever he should be thereafter requested, and all this after the said pl't's had made their appeal to the Com'r Int. Rev., according to the statute & regulations of the Dep't, made & provided in such cases; yet the said def't, not regarding his several promises & assumptions, hath not as yet paid the said several sums of money, or any of them, or any part of same, to the said pl't's, although often requested to do so, but to pay the same, or

19 any part thereof, hath hitherto refused, & still doth refuse, to the damage of the said pl't's of $501; and therefore he brings this suit.

W. P. BURWELL, *P. Q.*

Exhibit with declaration.

E. H. B.] (Copy.)

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, May 13th, 1875.

SIR: The claim of Salmon & Hancock, for the refunding of 377\frac{80}{100}$, on account of an additional tax of four cents per lb. paid upon tobacco, is rejected, for the reason that the tax was properly assessed and collected.

Respectfully,
(Signed) J. W. DOUGLASS,
Commissioner.

RUSH BURGESS, Esq.,
Coll. 3rd Dist., Richmond, Va.

J. L. A.

20 (Endorsements on declaration:)

1875. June Rs., Decl. & C. O.
" July, " C. O. C. & W. E.
" Octo. 25. Removed to the circuit court of the United States under a writ of certiorari.

Order to certify.

VIRGINIA:

In the circuit court of the city of Richmond, October 25, 1875.

WILLIAM L. SALMON AND W. T. HANCOCK, partners, trading under the name and style of Salmon and Hancock, pl't's,
against
RUSH BURGESS, DEF'T. } In case.

A writ of certiorari was this day produced, commanding the judge of this court to send and certify the record and proceedings in this suit, with all things touching the same, to the circuit court of the United States forthwith; whereupon it is ordered that the same be certified accordingly.

A copy.
Teste: ALFRED SHEILDS, *Clk.*

Plaintiffs' costs: Clerk's fees, $2.06; sh'ff's fees, 50; att'y & tax, 3.50—6.06.

Def't's costs: Clerk's fees, $1.31; att'y, 2.50—$3.81.

Teste: ALFRED SHEILDS, *Clerk.*

21 And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in

said district, on Wednesday the 8th September, 1875, the following demurrer was filed:

Demurrer to declaration.

RUSH BURGESS
ads.
SALMON & HANCOCK.

And the said defendant, by L. L. Lewis, United States district attorney, comes and says that the said declaration is not sufficient in law.

L. L. LEWIS,
U. S. Att'y, P. D.

Thereupon the following order was entered:

Order overruling demurrer to declaration.

This day came the parties by their attorneys, and thereupon the matters of law arising upon the defendant's demurrer to the plaintiffs' declaration being argued, it seems to the court that the said declaration and the matter therein contained are sufficient in law to maintain the action aforesaid. Therefore, it is considered by the court that the said demurrer be overruled.

22 And at another day, to wit, at a court held as aforesaid, on Wednesday the 17th day of November, 1875, the parties by their attorneys filed the following stipulation and agreed statement of facts:

23 *Stipulation.*

In the circuit court of the United States for the eastern district of Virginia.

SALMON & HANCOCK
vs.
RUSH BURGESS, COLLECTOR. } Assumpsit. No. 1226.

We, the undersigned, W. P. Burwell, attorney for the said plaintiffs, and L. L. Lewis, United States attorney, who appears for the said defendant, hereby agree to waive a jury in this cause, and to submit the issues of fact therein to the judgment of the court, and that the special finding of the court upon the facts agreed, as set forth below, shall have the same effect as a verdict of a jury in this cause.

W'M P. BURWELL,
Counsel for the Plaintiffs.
L. L. LEWIS,
U. S. Att'y, & Attorney for the Def't.

Agreed statement of facts.

We agree that the material facts in this case are as follows: That the defendant was collector of internal revenue for the third collection district of Virginia, as set forth in the declaration; that in his
24 capacity as collector he exacted of and received from the plaintiffs and paid into the Treasury of the United States the sum of money

in the declaration mentioned as an additional tax of four cents per lb. on a quantity of tobacco belonging to the plaintiffs as tobacco manufacturers in the city of Richmond, in their manufactory on the 3d day of March, A. D. 1875, under the provision of an act of Congress entitled "An act to further protect the sinking fund and provide for the exigencies of the government," approved March 3, 1875.

We further agree that said tobacco was stamped, sold, and removed for consumption or use from the place of manufacture, and beyond the control of the plaintiffs, in the forenoon of the third day of March, A. D. 1875, and that the said act of Congress was signed or approved by the President after the stamping and removal of said tobacco, to wit, in the afternoon of the same day; and that said tobacco, when removed, was stamped with internal-revenue stamps at the rate of 20 cents per
25 lb. We further that payment of said additional tax of four cents per lb. on said tobacco (amounting to three hundred and seventy-seven dollars and eighty cents) was made by the plaintiffs under protest, and that an appeal was filed by them before the Comm'r of Internal Revenue at Washington, praying that said sum of money be refunded to them, as having been illegally collected of them, by the defendant, and that said appeal was overruled by the Commissioner on the 13th day of May, 1875, after which this suit was instituted.

We further agree that prior to the passage of the said act the defendant was instructed by the Commissioner of Internal Revenue to continue to sell stamps for tobacco at the rate of twenty cents per lb., until further instructions from him; and that instructions to discontinue the sale of stamps at the rate of twenty cents per lb. on tobacco were not received by the defendant from the Commissioner of Internal Revenue until five o'clock in the afternoon of the third day of March, A. D. 1875.

26 We further agree that this case shall be heard at the present time by this court.

This stipulation and agreement of facts is made and filed under the provisions of the act of Congress approved March 3, 1865. (Sections 649 and 700 of the Revised Statutes of the United States.)

W'M P. BURWELL,
Counsel for Pl'ff.
L. L. LEWIS,
U. S. Att'y and Att'y for Defendant.

And now at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at the court room thereof, in the city of Richmond, in said district, on the 17th day of November, 1875, an order is entered, as follows:

27 *Final order and judgment.*

SALMON & HANCOCK
vs.
RUSH BURGESS.

This day came the parties by their attorneys, and by consent of parties it is ordered, that the order entered in this cause on the 8th day of September, A. D. 1875, overruling the defendant's demurrer to the plaintiffs' declaration, be and the same hereby is annulled and set aside. And the court having further considered the questions of law arising

upon said demurrer, and being of opinion that the matters contained in said declaration are sufficient in law to maintain the plaintiff s' action, it is ordered that the said demurrer be and the same hereby is overruled.

And thereupon the def't, by his attorney, filed a plea of non assumpsit, to which the plaintiffs replied generally; and the parties, by their attorneys, waiving a jury and submitting the issues of fact (agreed upon and filed with the clerk of this court) to the judgment of the court; and the court finding the facts as contained in the agreement of facts
28 filed as aforesaid; it is considered by the court that the plaintiffs recover of the defendant the sum of three hundred and seventy-seven dollars and eighty cents, and their costs by them in this behalf expended.

Whereupon, on motion of the district attorney, by directions of the Treasury Department, a writ of error to the Supreme Court is allowed from this judgment.

Citation waived by plaintiffs' attorney.

29 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Virginia, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between W'm L. Salmon and W. T. Hancock, partners, trading under the name and style of Salmon and Hancock, and Rush Burgess, a manifest error hath happened, to the great damage of the said Rush Burgess, as by complaint appears, he being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the district of Virginia, together with this writ, so that you may have the same at Washington, in the District of Columbia, on the second Monday of October next, in the said circuit court, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 17th day of November, in the year of our Lord one thousand eight hundred and seventy-five.

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Filed November 17th, 1875.

M. F. PLEASANTS, *Clerk.*

30 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify the foregoing to be a true and complete transcript of the record and proceedings in the cause therein named.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Richmond, this 31st day of January, 1876.

[SEAL.] M. F. PLEASANTS, *Clerk.*

(Indorsement on cover:) No. 353. Rush Burgess, collector of internal revenue, plaintiff in error, vs. William L. Salmon & W. T. Hancock, as Salmon & Hancock. E. Virginia C. C. U. S. Filed 8th February, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

RUSH BURGESS, COLLECTOR,
vs.
WM. L. SALMON AND ANOTHER. } No. 90.

ERROR TO UNITED STATES CIRCUIT COURT FOR EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

RUSH BURGESS, COLLECTOR,
vs.
WM. L. SALMON AND ANOTHER. } No. 90.

ERROR TO UNITED STATES CIRCUIT COURT, FOR EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The facts of this case, as agreed upon, were these: That the plaintiff in error, who was defendant below, was collector of internal revenue for the third collection district of Virginia, and in that capacity exacted from and received of the original plaintiffs and paid into the Treasury of the United States the sum of money in the declaration mentioned as an additional tax of four cents a pound on a quantity tobacco belonging to Salmon & Hancock, tobacco manufacturers in Richmond, in their factory, on the 3d day of March, 1875, under act of that date, C. 127, § 2 (18 Stats., 339), which provides: "That

section 3368 of the Revised Statutes be amended by striking out the words 'twenty cents a pound' and inserting in lieu thereof the words 'twenty-four cents a pound.'" * * * "*Provided*, That the increase of tax herein provided for shall not apply to tobacco on which the tax under existing law shall have been paid when this act takes effect." (18 Stats., 339.)

The tobacco in question was stamped, sold, and removed for consumption or use from the place of manufacture, and beyond the control of Salmon & Hancock, in the forenoon of March 3, 1875, and the above-named act of Congress was approved in the afternoon of that day, after the stamping and removal of this tobacco, which, when removed, had been stamped at twenty cents a pound. Payment of the additional four cents a pound (amounting to $377.80) was made under protest, and an appeal regularly taken and overruled. The collector had been directed by the Commissioner of Internal Revenue to sell stamps at twenty cents a pound until further orders, and no contrary instructions were received till 5 o'clock in the afternoon of March 3, 1875. Upon these facts the plaintiffs had judgment below against the collector for the additional four cents a pound so exacted.

Assignment of errors.

The plaintiffs in error assign for error the judgment of the circuit court in favor of said Salmon & Hancock for $377.80 (Record, 10, top), and say that by law, upon the facts agreed and ascertained, the judgment should have been in favor of said Burgess for his costs.

BRIEF.

The act of March 3, 1865, imposed a duty of twenty-four cents a pound upon all tobacco which had not paid the pre-existing rate at the time "when this act takes effect."

When was that? March 3, 1875, and not on any given hour, minute, or second of that day. All tobacco sold or removed for consumption on that day must, then, pay the increased tax.

Admit hardship, if you please; such legislation, however, is usually well enough known beforehand for dealers to discount its effects in their sales; yet this is not effectual to change the principle of law, that no part of a day should be recognized in determining the applicability of a statute. La Peyre *v.* U. S. (17 Wallace, 191, affirmed in eight cases, numbered 522 to 529 inclusive); U. S. *v.* Norton and others (at the last term); U. S. *v.* Arnold (1 Gall., 356, 357, affirmed in 9 Cranch, 105, 120); Matthews *v.* Zane, 7 Wheat., 164; *In re* Welman, 20 Vt., 653; *In re* Howe, 21 Vt., 619.

To hold otherwise will make a law operative or not as the different juries may find the precise moment of approval. It is against public policy to make that an issuable question.

EDWIN B. SMITH,
Assistant Attorney-General.

IN SUPREME COURT OF UNITED STATES,

OCTOBER TERM, 1878.

RUSH BURGESS, COLLECTOR,
vs.
WM. L. SALMON & ANOTHER. } No. 90.

Brief for Defendants in Error.

The brief of the Assistant Attorney-General in behalf of the plaintiff in error should have referred in its statement to a further section of the Revised Statutes, 3,378, which embodied a PENAL *provision* in the law, as amended by the act of 3d March, 1875, intended to enforce the *increased rate of* 24 *cents* on tobacco: "Every person who removes from his manufactory tobacco without the proper stamp being affixed and cancelled * * * shall, for each offence, be fined not less $1,000 and not more than $5,000, and be imprisoned not less than one year and not more than two years."

The character of the act of March 3d, 1875, containing provisions, not only increasing the rate of taxation on this subject, but also penal provisions to enforce that rate, will at once appear, and will show, that the construction of the Ass't Attorney-General cannot prevail in the determination of the *point of time*, (*punctum temporis*,) at which such an act should take effect, and the authorities cited by him have very little relevancy to the case at bar.

The case of La Peyre *vs.* United States, 17 Wall., p. 191, especially relied on by him, only raised the question as between the DAYS the proclamation of the President should take effect—whether on the 24th June, 1865, the day of his signature, or the 27th, the day of its promulgation—a question which alone could be raised by the facts certified in that case, and as distinct as possible from the one raised

by the case at bar, which is at *what hour in the day the act in question took effect.*

It is true that the four judges who determined that case incidentally recognized as a general principle, that at common law there was no fractions of a day, but the four dissenting judges (Judge Davis appears to have approved the judgment only), express their opinions in behalf of the qualification of this common-law principle, of an enquiry into fractions of a day in giving effect to statutes, whenever it was necessary to protect *property* and *contract* rights under existing laws, and they emphasized that opinion in the case of statutes which contained provisions penal in their character, as this act of 3d March, 1875.

In regard to giving *this proclamation a retroactive effect* from the 27th of June, the day of its promulgation, to the 24th, the day of its signature, these judges expressed their opinion in the most emphatic manner, declaring that it would be violative of every idea of constitutional law and common right, citing in this connection Fleeker *vs.* Peck, 6 Cranch, and Cummins *vs.* Missouri, 4 Wall.

In this branch of the opinion there must have been an entire concurrence of all of the judges.

The construction, therefore, of the commissioner, of the act of 3d March, 1875, under which this plaintiff in error acted, comes fully within this condemnation, inasmuch as it converts every manufacturer who shipped out of his factory a box of tobacco stamped with a 20-cent stamp, in the forenoon of that day, into a felon, and clothes with the highest penal consequences the innocent acts of these defendants in error, whose action at the time it took place were innocent under existent law.

We submit whether the case of La Peyre, when properly analyzed, instead of supporting the theory of the Assistant Attorney-General, is not decidedly against him.

The cases cited of Matthews *vs.* Zane, 7 Wheat., and United States *vs.* Arnold, 9 Cranch, equally raise an entirely distinct question. In these the question is what day the acts took effect, not *what hour* in the day.

As the Commissioner seems to have gone before the country on the authority of this *Arnold case*, and have justified the action of

which the defendants in error complain, let us mark the differentia between that case and the one at the bar. Judge Story, delivering the opinion of the court in that case, held that the words "from and after its passage" must be held as putting the statute into effect on 1st July, 1812, the day of the signature of the President, and not on the 2d, as was there contended. A reference to the pleadings will show that no other question could have been raised or decided than this.

We submit that the difference in the construction of the two acts of Congress is most marked. The construction given in the Arnold case is consistent with a constitutional construction, while that put on the act of March 3d by the commissioner is violative of one of the most cherished limitations on congressional action.

The construction in the Arnold case is, moreover, consistent with the terms of the act of Congress which it undertakes to construe, while in this case that of the commissioner is in direct conflict with the terms of the act of March 3, which provides "that the rate of this act shall not apply to any tobacco which has paid the tax according to existing law at the time this act takes effect."

In fine, the construction given to that act did not involve the innocent action of business men in penal consequences, while this attributes the higher grade of offences to the action of business men throughout the entire country, believed by them to have been perfectly innocent at the time.

But what seems remarkable, that the commissioner should have adopted a construction on the authority of a case in which the judge who delivered that opinion, afterwards sitting as circuit judge in case of Richardson, 2 Story, 571, declared he was not bold enough to say that an act of Congress should affect proceedings, by relation, commenced at an antecedent period of same day in which the President signed the act, and that he could not but view such an interpretation as at war with the true character and objects of the constitution. That this doctrine that there was no fraction of a day was true only *sub modo*, and in a limited sense, and only to be applied where it would promote the right and justice of the case. Judge Story, in delivering this opinion, held that the very truth and facts in point of time when the President signed the act might be

averred and proved in furtherance of justice; that while it might not be easy in all cases to ascertain the very *punctum temporis* of the signature, yet this argument of inconvenience ought not to deprive the citizen of any rights created and vested in them by any antecedent laws.

If this emphatic denunciation of this eminent jurist was against an interpretation which affected civil rights under a judicial proceeding commenced before the President's signature, what would it have been as against the construction of the commissioner of the act in question, by which innocent acts, performed before that signature, are invested with the highest penal consequences?

In re, Ankrim, 3 McLean, 285, Justice McLean is equally emphatic against the application of this fiction of the common law to such cases—for he says there is no difference in principle where the application of this fiction should give a statute a retrospective effect *one hour, day, or month* before its signature. In Pierrepont *vs.* Graham, 4 Wash., cl. ct., 240, Justice Washington sanctioned these views. Chief-Justice Chase, *in re* Winne, Johnson, cl. ct. R., said also, "we entirely concur with Mr. Justice Story in thinking, when the question is as to the effect of a proceeding instituted on the same day on which an act of Congress is passed, that the precise time at which the President signed the act may be properly inquired into, and in this we think we are warranted by the reasonings of the Supreme Court—Gardner *vs.* Collector, 6 Wall, 499.

See also Brainard *vs.* Bushnell, 11 Connnecticut, 17, and People *vs.* Clark, 1st California, 408. This last is directly on the point of the necessity and propriety of an inquiry into the very point of time when the act is signed.

The English courts equally recognize the cases in which this fiction ought not to be applied. See Wraugham *vs.* Kersey, 3 Willes, 274, where it is said *Fictio juris neminem lædere debet.*

In Pitte *vs.* Combe, 3 Barrow, 1,433, Lord Mansfield said where the right and justice of the case requires, that a day is not to be regarded as a mathematical point, but the very hour may be inquired into.

Kent, in his commentaries, 455, says, to give a retroactive construction to a statute clothes it with the character and all the

mischiefs of an *ex post facto law*. In Potter's Dwarris, p. 162–3, note 9, the same view is taken.

In the 3d volume of opinion of Attorney-General, p. 82, the *then Attorney-General* held that the time of the signature of the President should be enquired into for the protection of rights acquired under antecedent law on same day.

The only cases cited by Assistant Attorney-General, which in any degree cover the case at bar and sustain the view of the plaintiff in error, are Wellman & Hawes, 20 and 21 Vermont—but even there a qualification to the application of this common law principle is recognized—when he quotes the authority of Lord Mansfield, who says that the law does examine into fractions of a day when it becomes necessary for the right and justice of a case. Yet, even if we hold that these two cases decided by [illegible], Judge Prentiss sustains the view of the plantiff in error, yet the weight of authority is overwhelming, as well as that of the reasoning against them.

To test this construction of the plaintiff in error further: suppose the President had, at 9 o'clock on the evening of the 3d March, vetoed this bill and returned it to the House of Representatives, and that body had at 10 o'clock P. M. passed it over the veto by a two-thirds majority, and it had been then taken to the Senate at 11 P. M. and there passed by a like majority, that would have given it the force of law at the very time it was vetoed by the President, contrary to the very terms of the Constitution, which says such a bill shall not have effect as law until passed over the veto by two-thirds of each house.

As a further constitutional test, suppose the President, at 9 o'clock that night, had pocketed this bill and the session had continued, could it constitutionally have become a law one moment sooner than ten entire days (excluding Sundays) from 9 P. M. of the night of the 3d. This fiction of the common law must therefore give way before these constitutional requirements.

In fine, the brief for the plaintiff in error says: Admit the hardships which such a construction fixed on the business men throughout the country, yet they could have discounted its effects in their sales. We submit that there should be necessity for discounting

such hardships against which the Constitution has protected not only these citizens immediately affected but all others.

In reply it may be further said that these defendants in error do not seek to change a principle of the common law, but they deny its application to the case at bar.

The Assistant Attorney-General further holds that the precise moment at which an act ought to take effect ought not to be an *issuable question*, to be determined by courts and juries, yet the Supreme Court, in Gardner *vs.* Collector, 6 Wall, p. 511, held that whenever a question arose in a court of law as to the precise time at which an act of Congress went into effect, that they have a right to resort to any source of information which is in its nature capable of conveying to the judicial mind a clear and satisfactory answer, seeking first the most appropriate, such as the journals of the two houses, &c.

In the case at bar the Circuit Court doubtlessly resorted to the best evidence attainable to find the fact that the act of March 3, 1875, was signed by the President at 9 P. M., after all these tobacco transactions were over.

I submit, therefore, whether the judgment of the Circuit Court of the United States for the Eastern District of Virginia should not stand.

W. P. BURWELL,
Counsel for Defendant in error.